

Special Edition
September 18, 2008

employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service
Tax Exempt and Government
Entities Division

A Publication of Employee Plans

September 30 - Deadline for Many Defined Benefit Plans to Obtain Actuary's Funding Certification

Sponsors of defined benefit pension plans that are subject to Code §436 and have calendar plan years are reminded of the importance of having an actuarial certification of the plan's adjusted funded target attainment percentage (AFTAP) for 2008 before October 1, 2008. If there has been no actuarial certification of the AFTAP for the plan year before October 1, the percentage is conclusively presumed to be less than 60 percent. In such a case, benefit accruals under the plan would have to cease as of October 1, 2008, and there could be no payment of benefits in the form of a single sum or other accelerated form of benefit on or after that date. In addition, certain other benefit restrictions under §436, if applicable, would be required to be imposed as well.

Section 401(a)(29) requires that a defined benefit plan (other than a multiemployer plan) satisfy the requirements of §436. Section 436 sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan:

- §436(b) places limitations on the payment of plant shutdown benefits and other unpredictable contingent event benefits,
- §436(c) places limitations on plan amendments that increase liabilities for benefits,
- §436(d) places limitations on the payment of accelerated benefit distributions (such as single sum payments), and
- §436(e) places limitations on benefit accruals.

These limitations are applied based on the plan's AFTAP for the plan year, as certified by the plan's enrolled actuary.

The limitations on payment of benefits and benefit accruals fully apply if the AFTAP is less than 60 percent. Under §436(h)(2), if the plan's enrolled actuary has not certified the plan's AFTAP by the first day of the 10th month of the current plan year, the plan's AFTAP for the current plan year is conclusively presumed to be less than 60 percent as of that day.

The House of Representatives and the Senate have both passed similar, but not identical bills containing technical corrections to the Pension Protection Act of 2006 (PPA). Both bills would grant the Treasury Department authority to develop special rules under §436 for plans with valuation dates other than the first day of the plan year (which are permissible only for small plans, defined as plans with 100 or fewer participants).

Please share this Special Edition with your colleagues. To subscribe to our newsletter, please go to www.irs.gov/ep. All editions of the *Employee Plans News* are archived there.

Proposed regulations under §436 were published as [§1.436-1](#). Section 1.436-1(h)(4)(iii) of the proposed regulations sets forth rules that apply if a certified AFTAP for a year is superseded by a subsequent determination of that year's AFTAP. In general, the proposed rules provide that, if the subsequent AFTAP determination is considered an immaterial change, the revised percentage does not affect whether the prior operation of the plan based upon the earlier certification satisfied the requirements of §436.

On February 19, 2008, the Service published [Notice 2008-21](#). Notice 2008-21, Part III.A provides that the final regulations under §1.436-1 will not apply for plan years beginning before January 1, 2009. Part III.B of that notice provides a transition rule for application of the §436 benefit limitations for small plans with end-of-year valuation dates for 2006, 2007, and 2008. Under that transition rule, such a plan is permitted to have its determination of the AFTAP for 2007 be based on the plan's actuarial valuation results for the 2006 plan year. (The 2007 AFTAP is relevant for applying the §436(h) presumptions in 2008 until a certification of the AFTAP is made for the 2008 plan year.) [Notice 2008-73](#) expanded this relief by removing the requirement that the valuation date for the plan year beginning in 2008 must be the end of the year. The relief provided by Part III.B of Notice 2008-21 (as expanded by Notice 2008-73) does not apply for purposes of determining the AFTAP for the plan year beginning in 2008.

Under Notice 2008-21, for plan years beginning in 2008, taxpayers must follow applicable statutory provisions and can rely on the proposed regulations. Taking into account the guidance in Part III.A of Notice 2008-21, the Service will not challenge a reasonable interpretation of an applicable statutory provision under §436 for plan years beginning in 2008.

Because the regulations will not be effective prior to 2009, and because technical corrections to PPA have not yet been enacted, actuaries for small plans with end-of-year valuation dates will have difficulty in timely certifying the AFTAP for the plan year that begins in 2008. In such cases, the Service will not challenge an actuary's certification of the AFTAP for the plan year beginning in 2008 merely because the certification was based on a date other than the end-of-year valuation date under §430 for that plan year, provided that the AFTAP is subsequently certified based upon the end-of-year valuation date and the subsequent certification does not result in a material change as defined under the proposed regulations.

In the absence of the enactment of technical corrections, §436 does not permit an actuary to certify the AFTAP using the results of the actuarial valuation for the prior plan year. However, in view of the difficulty in changing valuation dates at this time, the Service will not challenge an actuary's use of end-of-year valuation results for the plan year beginning in 2007 (with appropriate adjustments) in order to make a reasonable estimate of the assets and funding target as of the first day of the plan year beginning in 2008 that is used for the AFTAP certification as of the first day of the 2008 plan year, subject to the requirements that the AFTAP be subsequently certified by the plan's enrolled actuary based upon the plan's actual valuation date for the plan year beginning in 2008 and that the subsequent determination does not result in a material change.